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Issue Date: 04 April 2006

CASE NO.: 2004-LHC-02432

OWCP NO. 14-134194

In the Matter of

HEIDI EBERLY-SHERMAN,
Claimant,
v.

DEPARTMENT OF ARMY/NAF,
Employer,
and

BROADSPIRE,
Carrier
and

CALYPSO HEALTHCARE,
Party-in-Intervention.

Appearances:

Charles Robinowitz,
for the Claimant and Party-in-Intervention.
Deidre Ford,
for the Employer and Carrier.

BEFORE: GERALD M. ETCHINGHAM
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171 *et seq.* Claimant Heidi Sherman ("Claimant") seeks compensation and medical benefits for a neck injury sustained in the course and scope of her employment as a Child and Youth Program Technician for the Department of the Army/NAF ("Employer") at Fort Richardson in Anchorage, Alaska.

A hearing was held on August 2, 2005 in Anchorage Alaska. All parties were represented by counsel. Claimant's exhibits ("CX") 1-92, Employer's exhibits ("EX") 1-18, and Administrative Law Judge exhibits ("ALJX") 1-11 were admitted. TR at 9-12. At the close of the hearing, the record was left open for the submission of post-trial briefs, which were filed by Claimant and Employer and became part of the record on October 31, 2005 as ALJX 12 and 13, respectively. TR at 191-93.

PROCEDURAL HISTORY

Claimant filed an LS-18 form on July 14, 2004, and Employer submitted its LS-18 form on October 28, 2004. A notice of trial (ALJX 11) was issued by Administrative Law Judge Gee on November 17, 2004, scheduling the trial for April 5, 2005. On March 4, 2005, Claimant filed her pretrial statement, exhibit list (ALJX 2), and witness list (ALJX 4), which were received by this office on March 11, 2005. On March 18, 2005, Employer filed its pretrial statement (ALJX 5), exhibit list, witness list, and a motion for late filing of pretrial statement, all of which were received by this office on March 21, 2005. On March 22, 2005, Claimant submitted an amended exhibit list that included some newly acquired documents. On March 24, 2005, Judge Gee issued an order (ALJX 10) transferring the case to me and continuing the hearing to June 21, 2005.

On April 20, 2005, Claimant submitted a motion for intervention on behalf of Calypso Healthcare ("Calypso"), Claimant's health insurance carrier. No answer to the motion for intervention was filed by Employer. On May 5, 2005, I issued an order continuing the hearing *sua sponte* to the week of July 25, 2005, to accommodate the scheduling of other cases. On May 10, 2005, the parties each submitted letters regarding problems with the rescheduling of this matter. On May 20, 2005, Claimant submitted a letter stating that the parties had agreed to enter the settlement judge process. On May 24, 2005, an order was issued appointing Judge Anne Beytin Torkington as the settlement judge for this matter. On June 23, 2005, I issued an order (ALJX 9) granting the motion for intervention and continuing the case to the week of August 1, 2005. On June 24, 2005, Claimant filed an amended pretrial statement (ALJX 1), changing the calculation of Claimant's average weekly wage and adding the claim of Calypso. On June 27, 2005, an order was issued concluding the settlement judge process, as Employer had withdrawn its request for a settlement judge.

On June 30, 2005, Claimant filed an amended exhibit list (ALJX 3), which was received by this office on July 6, 2005. On July 13, 2005, Employer submitted an amended witness list (ALJX 7) and an amended exhibit list (ALJX 6), which were received by this office on July 15, 2005. On July 26, 2005, I issued an order (ALJX 8), clarifying that the hearing date and location. The hearing was held on August 2, 2005 in Anchorage, Alaska.

A telephone conference was held on September 20, 2005. On September 23, 2005, Claimant submitted a letter (ALJX 14), which was received by this office on September 26, 2005, stating that the parties had agreed 1) to an average weekly wage of $485.00, and 2) that, for the purposes of section 14(e), an informal conference with the District Director's office occurred on September 17, 2002.

On September 28, 2005, Claimant and Employer each submitted letters, which were

received by this office on October 3, 2005, stating that they would submit their closing briefs on October 17, 2005 instead of October 3, 2005 in order to facilitate settlement discussions. On October 13, 2005, Employer submitted a letter, which was received by this office on October 18, 2005, stating that the parties had agreed to file their closing briefs by October 24, 2005. On October 21, 2005, Claimant submitted a letter requesting an additional day to file his closing brief and stating that Employer did not object to the request. On October 24, 2005, Employer filed its closing brief (ALJX 13), which was received by this office on October 28, 2005. On October 25, 2005, Claimant filed her closing brief (ALJX 12), which was received by this office on October 31, 2005. On November 7, 2005, Claimant submitted a letter (ALJX 15), which was received by this office on November 14, 2005, withdrawing Claimant's request for additional compensation under section 14(e).

On November 28, 2005, Claimant's counsel filed a motion to correct the hearing transcript in this case citing 118 separate error requests for corrections without noting which corrections, if any, are material to Claimant's case and which are immaterial grammatical differences of opinion.[1] On December 5, 2005, Employer's counsel filed its joinder letter concurring with the suggested changes but also not specifying which, of the 118 typo errors, is material to my decision. While I admonish the court reporter, Ms. Tara Witterholt's inaccuracies and careless errors in the transcript, I deny the motion as it fails to distinguish which, if any, of the errors, is material to this case. In the future, counsel should incorporate similar motions with their closing briefs so it is clear which errors are believed to be material rather than harmless.

STIPULATIONS

At the hearing (TR at 13-15, 24), the parties stipulated to the following:

1. Claimant suffered an injury. (CX 1, CX 2; CX 5 at 5-6)
2. The injury arose out of and in the course of her employment with Employer. (CX 1, CX 2)
3. At the time of injury, an employer-employee relationship existed between Claimant and Employer. (CX 1, CX 2)
4. The place of injury was Fort Richardson in Anchorage, Alaska. (CX 1, CX 2)
5. The date of injury was October 20, 2000. Also on that date, disability commenced, Claimant became aware that the disability was work-related, and Employer had notice. (CX 1; CX 2)
6. The claim was timely filed and timely noticed. (CX 1; CX 2)
7. Claimant reached maximum medical improvement on June 2, 2004. (CX 64 at 105; ALJX 12 at 11-12)
8. At the time of the hearing, Claimant was not working. (TR at 147)
9. At the time of the hearing, Claimant was receiving compensation from Employer in the amount of $82.88 per week (TR at 15; CX 4 at 4; EX 5 at 38), but Employer was not providing medical benefits. (TR at 40-41,52-56; CX 77 at 161)
10. Claimant is unable to return to her usual work, and Employer has no alternative work for her. (CX 71; CX 73; EX 8)
11. The Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §

[1] For example: Item 8 states: "Page 21, line 23: 'lunch break' should be 'lunch break'.

901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171 *et seq.* applies to this claim.
12. This is an unscheduled claim.
13. No Special Fund relief is sought.

Through correspondence (ALJX 14; ALJX 15) and briefs (ALJX 12; ALJX 13) exchanged after the hearing, the parties also stipulated to the following:

14. Claimant's average weekly wage was $485.00.[2] (CX 3; EX 1; EX 3; EX 6; ALJX 12 at 6-7)
15. Employer/Carrier has made a lump sum payment to Claimant for the difference between the benefits she was paid for TTD and TPD at the old rate and at the new rate, of $485.00. (ALJX 13)
16. Claimant does not claim additional compensation under section 14(e). (ALJX 15)

Because there is substantial evidence in the record to support the foregoing stipulations, I accept them.

ISSUES FOR RESOLUTION

1. Extent of Claimant's temporary and permanent disability;
2. Extent of reimbursable medical expenses including expenses for chiropractic and massage treatments incurred by Claimant and Calypso.

ALJX 12, ALJX 13.

FINDINGS OF FACT

Claimant was born on April 27, 1960, and was raised in Orlando, Florida. TR at 63. She left high school in the eleventh grade, but later obtained a General Education Degree (GED). TR at 64. After leaving high school, she worked for short periods of time in housekeeping at a hotel, as a waitress, and in a plant nursery, while caring for her young son. TR at 68. She then worked for about two years at a day care center. TR at 64-65. She then moved with her first husband to Ohio for about six months, where she worked as a waitress. TR at 65. Claimant then moved to Anchorage, Alaska when her first husband was transferred by the military to Fort Richardson. TR at 65-66.

Upon arriving at Fort Richardson, Claimant immediately sought a position at the child care center, which is for the children of military families. TR at 66, 67. She was first hired by the part-day, school-age program to work as substitute for employees who were out on sick or vacation leave. TR at 66. Within a year, Claimant was hired for a permanent, full-time position as a van driver and classroom worker. TR at 66. Claimant worked in that position for approximately four years. TR at 66. Claimant then moved to Dothan, Alabama when her first husband was transferred there by the military, but she only remained there about 10 months

[2] This average weekly wage is calculated under section 10(c) of the Act. *See* ALJX 12 at 6-7.

because her marriage dissolved. TR at 66-67. Claimant moved back to Anchorage, Alaska in or around 1992 and returned to work at the child care center at Fort Richardson. TR at 67. She married her present husband in 1994. TR at 67.

At the time of the injury in October 2000, Claimant was a Child and Youth Program Technician and the lead physical teacher in the Rainbow Room at Child Development Services part-day program. TR at 68, 71. Claimant, with an assistant, was responsible for 21 children aged three to five years old. TR at 69. Her position involved supervising and teaching children, performing housekeeping activities, occasionally shoveling snow, lifting up to 40 pounds, and sustained walking, bending, stooping and reaching activities. TR at 68, CX 71 at 128. Additionally, as the lead teacher, she was responsible for lesson plans, organizing games and activities, conferring with parents, setting up the classroom and bulletin boards, and mentoring the staff. TR at 69.

As an employee at the child care center, Claimant participated in mandatory training modules and other required trainings by the military. TR at 68-72. To become a lead teacher, she was also required to obtain a child development associates credential, which is equivalent to an associate's degree. TR at 68-70; CX 74. Claimant had to renew this credential every few years to keep her position. TR at 70-71.

Several years prior to the injury at issue, Claimant pulled a muscle in her neck while throwing garbage into a dumpster at work. TR at 75-76. After the injury, Claimant went to a primary care facility, where she was prescribed a collar and muscle relaxants. TR at 76. The injury resolved within a few days, and Claimant did not miss any work. TR at 76. Claimant did not have any other problems with her neck or headaches until the injury at issue. TR at 76, 79.

On October 20, 2000, Claimant was working with a small group of her pre-school students in the back of the school gymnasium. TR at 74. Claimant was on her hands and knees with her head facing down, as she was tracing the body of the one of the students for a project. TR at 74. Then, a student on the other side of the gymnasium started running toward Claimant while rolling a hard plastic wheel that was about three feet tall and eighteen inches wide. TR at 74. While Claimant's head was still facing down, the wheel slammed into the top of her head. TR at 74. She testified that "it felt as if I'd been hit over the top of the head with a bat. It almost knocked me unconscious." TR at 74-75. Claimant's head and neck were "squashed backwards," her head rolled to the right, and she fell back. TR at 75. Claimant was crying in pain and was given an ice pack by her teaching assistant. TR at 75. She stopped work temporarily but then resumed later that day. CX 1 at 1.

Claimant filed a notice of injury (Form LS-201) on October 21, 2000. CX 1 at 1. Employer filed a report of injury (Form LS-202) on October 23, 2000. CX 2.

Claimant received regular raises, and was earning $12.55 per hour at the time of injury. TR at 72-73. In addition, Claimant and the other employees at the child care center received a 25 percent, non-taxable, cost-of-living allowance. TR at 73-74.

Claimant was evaluated by Dr. Frank Moore, M.D., at Providence Alaska Medical Center

on October 21, 2000, the day following her injury. TR at 75; CX 5 at 5. She complained of aching pain in her neck, across the top of her shoulders, and into the base of her head since the accident, and she noted that the pain increased when she moved her head or neck or looked down. She also complained of dizziness, light-headedness, nausea, swelling in the eyes, slightly blurred vision, and occasional pain in the right ear. Dr. Moore noted tenderness across the top of her head and in the mid- and lower-cervical spine, and pain when turning her head. A CT scan of her head was normal, and x-rays of her cervical spine showed very minor degenerative disc disease but no fracture. EX 11. Dr. Moore diagnosed a contusion on the top of her head, a cervical strain, and a possible mild concussion. CX 5 at 6. Claimant was prescribed medication, directed to stay off work for seven days, and told to follow-up with Dr. Derek Hagen.

On October 26, 2000, Dr. Hagen evaluated Claimant. CX 7 at 8. She stated that she had been treating herself with cold and hot packs, using a cervical pillow, and taking Advil and Percocet, but that her pain had been increasing and radiating out into her right shoulder. Dr. Hagen noted tenderness on her neck and spine, and muscle fullness and somatic dysfunction along the spine. His impressions were whiplash/cervicalgia and possible mild concussion. CX 7 at 9. He prescribed further medications for pain and muscle spasm, and directed Claimant to be off work until November 2, 2000.

Claimant followed up with Dr. Hagen on November 1, 2000 and November 15, 2000. CX 8 at 11; CX 9 at 12. Claimant's symptoms were the same and she continued to require pain medication. Dr. Hagen noted some improvement in her symptoms, and he released her to return to limited duty work as of November 16, 2000 and regular duty as of November 20, 2000, provided she continued to improve.

Claimant went back to work on or about November 15, 2000.

Claimant followed up with Dr. Hagen on November 29, 2000. She complained of a headache at the time, increased neck pain over the previous three days, and nausea and vertigo, mostly at night. She stated that she was having good and bad days. He diagnosed whiplash/cervicalgia again, as well as vertigo and headaches. Dr. Hagen noted that she had been doing her regular work since November 20, 2000 and could continue in that capacity. He prescribed medication "to help relieve some of this inflammatory flare-up" and told Claimant to increase her fluids and rest.

Claimant continued to work from around November 15 through December 26, 2000. Claimant followed up with Dr. Hagen on December 29, 2000. She complained of severe neck pain, headaches, and vomiting, which had increased over the previous three days such that she had been unable to work since December 26, 2000. Dr. Hagen again noted tenderness, muscle spasm and fullness, and somatic dysfunction along Claimant's thoracic and cervical spine. He diagnosed cervical and thoracic back pain, headaches, and nausea and vomiting. Claimant was directed to start physical therapy at Reclaim Health. Over the months that followed, Dr. Hagen kept extending the period that Claimant should be off work. CX 12; CX 15.

Claimant evaluated for physical therapy at Reclaim Health by Amy Hunt, OTR/L on January 4, 2001. CX 13 at 16. Her complaints and symptoms were generally the same.

Claimant was treated with 46 sessions of physical therapy and massage therapy at Reclaim Health through the fall of 2001. CX 87 at 184.

On February 8, 2001, Claimant began treatment with Dr. Shaun Hadley, Dr. Shaun Lehman, and Clyde Bullion, PA-C at Alaska Rehabilitation Medicine ("Dr. Hadley's office"). On that day, she was evaluated by Mr. Bullion. Claimant's complaints and symptoms remained the same, and she also complained of balance problems since her work injury. Mr. Bullion ordered the following tests: liver panel, renal function panel, urinalysis, MRI of the cervical spine, and flexion-extension views of the cervical spine. CX 16 at 24. Claimant followed up with Dr. Hadley's office on February 15, 2001 and February 20, 2001. CX 17 and CX 18. The tests showed no problems, except that the cervical spine tests showed some degenerative changes at C6-7 with mild hypertrophic spurring, and mild spondylosis at C6-7. EX 12; EX 13; CX 18 at 26. Claimant followed up again on March 6, 2001, and March 13, 2001, and was directed to remain off work. CX 22; CX 23.

On March 29, 2001, Dr. Hadley's office evaluated Claimant again, and recommended that she could return to work half-time beginning on April 9, 2001. CX 24. Claimant sought light duty work with the Department of the Army.

On April 9, 2001, Claimant was assigned to work in an office looking through children's files. TR at 139-40. Claimant was only able to do this work for one week because sitting with her neck down felt horrible. TR at 140. She was paid $188.23 for one week of work. ALJX 12.

Claimant returned to Dr. Hadley's office on April 17, 2001; May 31, 2001; June 14, 2001; October 10, 2001; October 18, 2001; November 5, 2001; and December 19, 2001. During each visit, she was directed to stay off work. CX 25; CX 28 at 39; CX 28 at 39; CX 28 at 40; CX 34 at 52-53. Claimant's diagnosis remained chronic neck pain syndrome, with ongoing high reported pain levels, and minimal spondylosis at C6-7. CX 34 at 53.

On May 5, 2001, Dr. Kenneth Pervier, a neurologist, wrote a letter in which he opined that Claimant's diagnosis was "residual paraspinal muscle pains, secondary to the 10-20-2000 injury." CX 27 at 36. While he was unable to definitively state whether the degenerative change in Claimant's spine was pre-existing or caused by the work injury, he opined that it was likely caused by the work injury. He stated that the degenerative change shown on the MRI indicates that "she will be far more prone to more rapid degenerative change at this area, and at surrounding levels in the cervical spine." CX 27 at 36. He opined that further treatment is "quite likely," including repeat physical therapeutic treatments to treat flare-ups and home physical therapy and exercises to "maintain good suppleness and strength of the neck, and cut the potential frequency of any needed revisits to physical therapy." CX 27 at 36-37

On May 8, 2001, Dr. Dwight Ellerbe, an otolarygologist, diagnosed and treated Claimant for right mastoiditis, which was causing a hearing deficit. He stated that this condition was unrelated to her October 2000 work injury. CX 87 at 185; CX 37 at 56. Claimant followed up with Dr. Ellerbe approximately eight times between May 8, 2001 and January 23, 2002. CX 87 at 185; CX 67 at 112.

On July 5, 2001, Employer/Carrier filed two notices of controversion to Claimant's medical expenses. First, Carrier controverted payment for lab work performed on February 8, 2001 because there was "[n]o objective medical provided to establish medical necessity of testing or causal relationship to the 10/20/00 on the job injury." CX 77 at 162. Second, Carrier controverted payment for a CT scan of Claimant's temporal bone performed on April 23, 2001 and for "all medical treatment for mastoiditis and otitis media as this condition is not causally related to 10/20/00 on the job injury." CX 77 at 163.

On July 12, 2001, Claimant was evaluated by Julie Osgood, a physical therapist working at United Physical Therapy. This evaluation was at the request or direction of Dr. Shaun Lehman of Dr. Hadley's office. CX 29 at 41-42. Claimant was treated with weekly massage therapy at United Physical Therapy at least through November 30, 2001. CX 36 at 55. On November 30, 2001, Julie Osgood, PT, ATC, at United Physical Therapy issued a letter stating that Claimant "has benefited in the past from weekly massage therapy. This appears to reduce her pain and allow her to perform her independent rehabilitation exercises in the pool more consistently." She opined that Claimant "would continue to benefit from attending massage therapy for pain management to help facilitate strength and endurance gains with exercise." CX 36 at 55.

On or around August 8, 2001, Denise McGovern, a registered, licensed occupational therapist, at ErgoScience administered a Physical Work Performance Evaluation at the request or direction of Dr. Shaun Lehman of Dr. Hadley's office. CX 32 at 47. She found that Claimant's overall level of work ability was "medium," and recommended that Claimant undergo movement therapy and continue pool therapy and massage. CX 32 at 49. Claimant suffered increased pain after this testing. CX 34 at 52.

On October 10, 2001, Dr. Hadley stated, "At this time, I feel there is little else to offer the patient from a rehab standpoint." Although Claimant expressed a goal of working toward a graduated return to work within two months, he opined that "[t]here may be some resistance to return to work at this time," and "advised her that it was difficult to declare her disabled from work based purely on subjective complaints." CX 34 at 53. He noted, "I informed the patient that I would not make a referral to a chiropractor, as I feel that continued passive treatments would not be of lasting benefit. If she wants to pursue another line of treatment, I suggested that she talk with her adjuster about this." CX 34 at 53. Dr. Hadley declared on November 5, 2001 that he was no longer Claimant's treating physician. CX 35 at 54.

On October 23, 2001, Ms. McGovern conducted a job analysis of Claimant's former position as a Child and Youth Program Technician/Childcare Attendant at Fort Richardson. CX 71. She opined that Claimant "would not be able to return to this position secondary to the muscle spasms and [her] guarded posture. The client's movements are very stiff and guarded increasing the stress placed on the client's neck and upper trunk. In this job a person needs to be able to move easily and quickly at times. This job entails being in numerous positions during the day." CX 71 at 130.

Dr. Holm Neumann conducted his first independent medical exam on November 30, 2001. EX 8. He diagnosed pre-existing degenerative disc disease in the cervical spine,

contusion to the top of the head secondary to the October 20, 2000 work injury, a sprain-strain injury to the cervical spine secondary to the work injury, and unrelated chronic mastoiditis and otitis. EX 8 at 56, 58. Dr. Neumann stated, "I would search for other causes for her current neck discomfort and would recommend that she seek re-evaluation with an ear, nose, and throat specialist in regards to clicking feelings in her throat and neck symptoms." EX 8 at 57. He determined that Claimant was at maximum medical improvement with regard to her cervical sprain/strain. EX 8 at 57. He stated that there was no further medical treatment within his specialty that would be reasonable and necessary, and opined that Claimant's massage therapy "would be basically palliative," and not curative or necessary for her condition related to the work injury. EX 8 at 57-58. He confirmed that Claimant could not return to her regular work, and he recommended a 20 pound maximum lifting limit. EX 8 at 58.

On December 4, 2001, Claimant was treated by Dr. John Hanley, M.D. at Providence Alaska Medical Center emergency room for a migraine headache. CX 36 A at 55A. She was again treated at Providence Alaska Medical Center emergency room for a migraine headache by Dr. Eva Carey, M.D. on November 3, 2002. CX 50A at 80B.

On December 19, 2001, Employer/Carrier filed a notice of controversion based on Dr. Neumann's IME report. Employer disputed medical treatment by an ear, nose, and throat specialist as unrelated to Claimant's work injury, and disputed massage therapy as not reasonable and necessary since she was at maximum medical improvement, according to Dr. Neumann. CX 77 at 160.

Claimant was evaluated by Chiropractor Edward Barrington on January 2, 2002 and his impressions were unresolved cervicodorsal sprain/strain with asymmetric loss of cervical range of motion, right-sided hearing loss secondary to mastoiditis, migraine headaches, and possible left C7 radiculopathy. CX 37 at 57. Chiropractor Barrington conducted an EMG, which showed nerve root irritation in the lower cervical spine, and nerve conduction study, which was normal, on January 15, 2002. CX 37 at 59. Chiropractor Barrington treated Claimant on at least six occasions through February 2, 2002. CX 76 at 155. On October 3, 2002, Chiropractor Barrington explained that although he had treated Claimant for subluxations with manual manipulation and appropriate therapy modalities, her condition did not resolve and he referred her to other physicians. CX 49 at 79. On June 24, 2005, Chiropractor Barrington sent a letter to Claimant's counsel, explaining that his "diagnosis of this patient included subluxations of her neck and back with recommendation for manual therapy and appropriate physical therapy modalities." CX 90 at 208. He explained that the diagnosis was based on "clinical evidence, as well as evidence on x-rays of her cervical spine, indicating spondylosis and resultant subluxation." CX 90 at 208.

On January 23, 2002, Employer/Carrier controverted payment for treatment of a migraine headache "as there is no objective evidence to establish relationship to the 10/20/00 on the job injury." Employer/Carrier also controverted payment to Chiropractor Barrington "as there is no evidence of a subluxation of the spine documented by an x-ray." CX 77 at 161. The notice stated, "Further medical treatment is denied." CX 77 at 161. Consequently, Claimant and her

husband, and their private insurance carrier, paid all subsequent medical bills. TR at 40-41, 52-56; CX 76; CX 78. Claimant and her husband spent at least $18,205.32 on medical care related to the October 2000 work injury. TR at 49; CX 78 at 164-67. The private insurance carrier, Calypso, paid at least $39,433 for medical treatment related to Claimant's work injury. CX 76 at 155-59. Claimant also presented evidence that there are outstanding charges from Dr. Chandler's office in the amount of $2,496.60. CX 88 at 205-06. Claimant's husband testified that additional charges have accrued since the above amounts were totaled. TR at 57.

On January 31, 2002, Dr. Leon Chandler, M.D., an anesthesiologist and pain specialist with a medical degree from Indiana University, performed an epidural block. CX 38 at 61; CX 68. However, Claimant experienced no pain relief. CX 67 at 112. Claimant was evaluated by Dr. Chandler again on February 6, 2002, and he recommended diagnostic facet blocks, oral narcotic therapy, and supportive physical therapy. CX 40 at 64-65.

On February 6, 2002, Dr. John Brannan, Jr. took dynamic motion x-rays of her cervical spine, which revealed moderate to advanced degenerative disc disease at C6-C7 with moderate uncinate hypertrophy and foraminal narrowing bilaterally. CX 39 at 63.

On February 14, 2002, Dr. Chandler performed diagnostic facet blocks at C4-5 and C5-6 and a C2 middle branch block. CX 41 at 66-67. Dr. Chandler testified that this procedure involved injecting dye into the facet joint of the neck and watching the movement of the dye using a DMX x-ray that shows the neck as it moves through a series of rotations. TR at 92. He explained that the x-ray showed the dye passing through Claimant's ligament and spilling out into the epidural space and down her spinal cord, whereas with a normal joint, the dye would have remained in the capsulated joint space. TR at 92, 116, 125. Based on this procedure, Dr. Chandler opined that Claimant had a torn ligament, or capsular tear, on the right of the facets in her cervical spine. He suggested radiofrequency lesioning at C4-5 and C5-6.

On February 20, 2002, Dr. Chandler issued a letter explaining that the diagnostic facet blocks showed that Claimant has a facet injury that is "permanent, progressive and painful." CX 42 at 69. He stated that further treatment would probably include repeated blocks of the joints and nerves of area, radio frequency lesioning, oral medications, possible fusion of her spine at the level of injury, and cervical epidural stimulator placement for pain control. CX 42 at 69.

On February 20, 2002, Claimant was separated from her employment with the Department of Army/NAF. The notice stated, "Medical authority has determined that due to your on the job injury that you are unable to return to duty in current position. Activity [sic.] [Agency] has been unable to find a position with duties you will be able to perform." CX 73 at 138.

Carl Gann, a rehabilitation counselor, used the August 2001 physical work performance evaluation to perform a labor market survey at the request of Employer/Carrier. EX 7 at 40. As of February 2, 2002, he found seven positions in the area with current or recent openings that could be appropriate for Claimant, and then sent the list of positions to Dr. Neumann for approval on February 11, 2002. (Mr. Gann also sent the list of positions to Dr. Hadley for approval, and was notified on March 4, 2002 that Claimant was no longer Dr. Hadley's patient.)

The positions were 1) a fast food worker/sandwich artist at Subway; 2) a fast food worker at Orange Julius; 3) a host at Taj Mahal Restaurants; 4) a hostess at Red Robin restaurant; 5) a server at Red Robin restaurant; 6) a housekeeper at Parkwood Inn; and 7) a barista at Heavenly Cup coffee shop. EX 7 at 41-47.

On February 22, 2002, Dr. Neumann approved of the following three positions from the Labor Market Survey: 1) the fast food worker/sandwich artist position at Subway, 2) the restaurant host position at the Taj Mahal Restaurant, and 3) the hostess position at Red Robin restaurant. CX 72. He did not approve of the following four positions: 4) the fast food worker position at Orange Julius, 5) the server position at Red Robin restaurant, 6) the housekeeper position at Parkwood Inn, or 7) the barista position at Heavenly Cup coffee shop. CX 72; EX 18 at 9.

An MRI of the cervical spine was conducted on March 1, 2002 at the request of Chiropractor Barrington, which showed small midline protrusion at C6-7 with associated degenerative changes. EX 14; CX 43 at 70.

On February 25, 2002, Claimant began treatment for massage therapy through Chiropractor William Ross of Excellence in Health Chiropractic, and she continued through September 6, 2002. CX 76 at 155-56. On May 13, 2002, Dr. Ross issued a letter stating that Claimant was being treated with "myofascial release and trigger point therapy, both of which are forms of manual therapy. This decreases the frequency and intensity of the headaches and neck/upper back pain. Many times the therapist needs to work on areas of secondary damage, such as mid back, because the main areas of injury are too inflamed or tender to treat directly." CX 44 at 71. Claimant testified that she went to Excellence in Health for massage therapy by a massage therapist, not for chiropractic care by a chiropractor. TR at 137-38. The reason Claimant sought treatment in this way was that the policies and procedures of her private insurance required her to seek massage therapy through a chiropractor's office, and Chiropractor Ross' office had a massage therapist. TR at 137-38.

On May 31, 2002, Debra McKay, PA-C, of Dr. Chandler's office issued a letter clarifying Claimant's diagnosis and the neck pain, limited mobility, muscle spasms, headaches, and right shoulder pain and conditions for which she was being treated in relation to the subject work-related October 20, 2000 injury. CX 45 at 72.

Claimant was evaluated on June 4, 2002 by Dr. Louis Kralick, a neurologist. He opined that her condition is not amenable to neurological intervention of the cervical spine and recommended that she continue with conservative pain management. He stated, "I would expect her to make some improvement with time, although it is doubtful whether she can return to her prior level of activity, given her current symptom level about 18 months out from her injury." CX 46 at 75.

On June 14, 2002, Claimant was evaluated and treated by Chiropractor Charles Krichbaum. CX 89 at 207. On July 25, 2002, he opined that her injuries were disc bulge at C6-7, discogenic spondylosis at C6-7, paravertebral and suboccipital muscle spasms, chronic sprain/strain of the cervical and thoracic spine, right thoracic radiculitis, and multiple vertebral

subluxations of the cervical, thoracic, and lumbar-sacral spine. CX 47 at 46. He stated that he would continue treat Claimant with chiropractic computerized adjustments and rehabilitative exercises. CX 47 at 47. On September 25, 2002, Chiropractor Krichbaum noted that the adjustments and myotherapy were providing Claimant's "most effective pain relief to date." CX 48 at 78. On March 15, 2005, Chiropractor Krichbaum issued a letter stating that the treatments he provided to Claimant from June 28, 2002 to October 9, 2002 and on January 6, 2003 were "for manual manipulation of the spine to correct subluxations shown by [his] x-rays and clinical findings." CX 89 at 207. Claimant testified that she treated with Chiropractor Krichbaum 10 to 15 times, and that "the chiropractor adjustments did not help [her], but the massage therapy was very beneficial." TR at 137.

On or around September 3, 2002, Claimant began working two hours per day for the Anchorage School District as a noon playground supervisor at Wonder Park elementary school. TR at 140; CS 73 at 138. In that position, Claimant supervised the students on the playground during their noon recess by walking around and making sure they were safe and not fighting. TR at 141. Claimant earned $9.00 per hour, and she believes the pay for the position was the same two years earlier, at the time of her injury. TR at 141. Claimant stayed in that position through the 2002-03 school year and returned for the 2003-04 school year. She started the 2004-05 school year, but could not continue because being outside in the cold weather aggravated her condition. TR at 143-44.

Claimant also tried selling Avon cosmetic products during the years when she was working at Wonder Park elementary school. However, her husband ended up having to do most of the work, and they made no profit. TR at 149.

On September 3, 2002, Dr. James Kallman, an otolaryngologist, issued a letter stating that Claimant had vertigo and a subjective hearing loss. CX 87 at 187. He expressed that the problem was treatable and would improve with home exercise. On November 26, 2002, he wrote another letter stating that her vertigo had resolved. CX 87 at 187.

Claimant was involved in a motor vehicle accident on or around October 9, 2002, in which she was rear-ended while stopped at a red light. TR at 154-55. She was treated by Debra McKay, PA-C in Dr. Chandler's office on October 10, 2002. She was also treated several times by Dr. Krichbaum after the accident. TR at 155. Her pain level increased but then returned to the level it had been at before. TR at 155.

On November 9, 2002, a brain MRI was conducted by Dr. Erik Maurer, M.D. at the request of Chiropractor Krichbaum. CX 50B at 80C. The results were normal.

On December 4, 2002, Claimant was evaluated by Dr. Lee Schlosstein, a rheumatologist, who diagnosed fibromyalgia and prescribed medication and exercise. CX 51 at 82. Dr. Chandler testified that Dr. Schlosstein was treating Claimant for her arthritis and spondylosis of the cervical spine. TR at 109.

On January 8, 2003, Chiropractor Cameron Kmet, D.C., at Excellence in Health issued an initial examination/evaluation report. CX 52. He noted that off all the medication and

treatments Claimant had been given, "the only lasting relief from treatment that she has received was following massage therapy, in which she will receive up to three days of pain reduction." CX 52 at 84. Claimant was treated with massage therapy by a massage therapist in Chiropractor Kmet's office through at least December 30, 2003. CX 76 at 156-58. Claimant testified that she found this massage therapy beneficial. As with Chiropractor Ross, the reason she used Excellence in Health was that she "had to go through a chiropractor for all Blue Cross/Blue Shield insurance to cover massage therapy." TR at 137-38.

Among other times, Claimant was evaluated and treated at Dr. Chandler's office for her neck pain on February 25, 2003; May 15, 2003; October 3, 2003; November 4, 2003; March 1, 2004; March 9, 2004; March 29, 2004; November 15, 2004; February 14, 2005; April 20, 2005; and July 18, 2005. CX 54 at 86; CX 55 at 87; CX 58 at 99; CX 59 at 100; CX 60 at 101; CX 61 at 102; CX 62 at 103; CX 63 at 104; CX 64 at 105; CX 65 at 107; CX 79 at 168; CX 80 at 169; CX 81 at 172; CX 82 at 174; CX 83 at 176; CX 85 at 180; CX 66 at 108; CX 91 at 209; CX 92 at 212.

On or around September 4, 2003, Claimant returned to work as a noon playground supervisor for the Anchorage School District at Wonder Park elementary school. She worked for the entire 2003-04 school, through approximately June 1, 2004.

Dr. Schlosstein referred Claimant on August 6, 2003, to the Mayo Clinic, because she had "exhausted the medical community in Anchorage, Alaska, with obtaining relief for [her] chronic pain problem, fibromyalgia, and osteoarthritis." CX 56 at 88.

Claimant was evaluated and treated at the Mayo Clinic in Scottsdale, Arizona from September 22, 2003 through September 29, 2003. CX 57. A scan of the cervical spine was conducted on September 22, 2003, which showed slightly narrowed interspace at C6 with moderate hypertrophic change, and limited range of motion. EX 15. An MRI of the cervical spine was performed on September 23, 2003, which showed mild narrowing, mild annular bulge, and adjacent degenerative marrow signal changes at C6-7. EX 16. She was diagnosed by different specialists with mixed vascular tension headaches, migraine headaches, and bilateral carpal tunnel syndrome; and post traumatic cervical myofascial pain syndrome on the right greater than the left, occipital neuralgia, post traumatic migraine headaches, and fibromyalgia. CX 67 at 112-13. The doctors at the Mayo Clinic prescribed Topomax for Claimant's migraines, which she has found to be extremely helpful.

On December 24, 2003, Claimant sought treatment and refills of her pain medications from Dr. Meganne Hendricks at Providence Alaska Medical Center emergency room. CX 59A at 100A.

Claimant slipped and fell on the ice in late February 2004. CX 61 at 102; TR at 144, 154. After the fall, she left work. TR at 144, 154. She went to Dr. Chandler's office Monday/the next day, complaining of pain in her spine and arms and tingling in her fingers and toes. CX 61 at 102. It took 2-3 weeks for Claimant to recover from the fall. TR at 144. Her pain level increased but then returned to the level it had been at before. TR at 155.

On June 1, 2004, Dr. Chandler's office noted that Claimant was doing "a little better," and her medications were continued with no changes. CX 64 at 105. She was given bilateral occipital nerve blocks and trigger point injections in the left and right trapezius muscles by Dr. Chandler's office. CX 64 at 106. On August 3, 2004, Claimant reported good results after the June 1 trigger point injections and that the Topomax medication had reduced her migraines, so more injections were scheduled and the medications were continued. EX 65 at 107.

On August 25, 2004, Dr. Cynthia Kahn of Dr. Chandler's office performed trigger point injections in Claimant's paraspinal muscles, left and right trapezius muscles, and right periscapular muscles. CX 79 at 168. When Claimant followed up with Dr. Chandler's office on October 20, 2004, she complained that the trigger point injections had not been helpful and had caused her more pain. CX 80 at 169.

Claimant again worked for a couple of weeks at the beginning of the school year, from about September 3 through September 10, 2004, as a noon playground supervisor. However, because she could no longer work that job outside in the winter, Claimant then sought a position with the after-school program of the Anchorage School District and began work with the after-school program in September 2004, for which she was paid approximately $120 per week. ALJX 12. In the after-school position, Claimant had to supervise approximately 100 students in the cafeteria by herself. TR at 145. The position involved checking in the students when they arrived, making sure they got to the classrooms with the after-school teachers where they did homework, getting them games, supervising snack time, and other tasks. TR at 145. Claimant was unable to handle the large number of students, due to the noise level and the fact that "most of them had special needs, as far as their school work and behavior problems." TR at 145. In addition, Claimant experienced problems because the after-school program was from 3:30 to 5:30 p.m. and her pain and fatigue increased over the course of the day. TR at 146-47. For these reasons, Claimant stopped working on or around November 12, 2004. TR at 146.

Claimant followed up with Dr. Chandler's office on November 12, 2004. CX 81 at 172. It was noted that she was "working in the evening with school age children. She has high level pain in the evening and did poorly." CX 81 at 172. She requested a nerve root block, which was performed at level C6-7 on November 15, 2004 by Dr. Chandler. CX 82 at 174. Claimant followed up with Dr. Chandler's office on December 2, 2004, and it was noted that the block was not helpful and her pain had been "horrific" since the procedure. CX 83 at 176. The increased pain was possibly due to "a bleed into the root sheath or steroid flare in the distribution of C5-6 cord region." CX 83 at 176. Some of Claimant's medications were changed due to problems she was having with prescription costs.

On December 7, 2004, an MRI of the cervical spine was performed by Dr. David Moeller, at the request of Dr. Chandler. EX 17; CX 84 at 179. The MRI showed "findings consistent with degenerative disc disease consisting of spurring and bulging of the annulus posteriorly at the C5-6 and C6-7 levels." EX 17; CX 84 at 178. Upon comparing this MRI to the March 30, 2004 MRI, it was noted, "The degenerative changes…at the C5-6 level are more pronounced on the current examination than on the previous examination. The changes of the C6-7 level are not significantly different from the previous study. The remainder of the cervical spine is unchanged." EX 17; CX 84 at 178-79. Claimant followed up with Dr. Chandler's office

on December 16, 2004 and it was confirmed that the MRI showed no problems. CX 85 at 180.

On February 14, 2005, Dr. Neumann conducted a second independent medical examination. CX 67; EX 9. His impressions were degenerative disc disease and degenerative joint disease at C6-7, C7 radiculopathy with degenerative changes, and neuroforaminal narrowing at C6-7. CX 67 at 115-16; EX 9 at 65-66. He opined that although he could not determine whether the degenerative changes were secondary to the October 20, 2000 injury or pre-existing, the work injury was "a significant factor contributing to her current condition." CX 67 at 116; EX 9 at 66. He opined that even if Claimant "did have some pre-existing degenerative change, it would be a combined condition with a worsening and permanent aggravation" due to her work injury. CX 67 at 117; EX 9 at 67. Dr. Neumann stated that future treatment would only be palliative, and recommended nonsteroidal anti-inflammatory medications and palliative massage therapy. EX 9 at 68. He stated that Claimant had permanent work restrictions due to the work injury, including that she should avoid frequent turning or up-and-down movements of the head, and should maintain a maximum lifting of 25-30 pounds. EX 9 at 67. He found that jobs he had approved in February 2002 were no longer appropriate for Claimant. ALJX 13 at 8.

On or around March 2, 2005 and March 3, 2005, Elizabeth Dowler conducted a physical capacities evaluation of Claimant, and she issued a report on March 9, 2005. CX 87. Ms. Dowler noted that Claimant experienced muscle spasms whenever she bends her head forward or uses her arms. CX 87 at 199. Claimant also experienced right cervical radiculopathy, including pain and tingling down the right arm, which could be controlled with head position. She also experienced cervicogenic headaches twice during the testing, when attempting to lift or hoist ten pounds. It was noted that Claimant was able to handle 20-30 pounds of weight, but that she reported high pain levels the next several days. Ms. Dowler emphasized that the physical capacities evaluation conducted in 2001, which found Claimant was able to handle weights of 20-30 pounds or more, did not accurately determine Claimant's ability to perform tasks regularly, because the test was done over only one day and "musculoskeletal pain consistently occurs the next day." CX 87 at 200. Ms. Dowler found that Claimant is able to work in a seated position for up to one hour at a time and in a standing position for about 30 minutes at a time. She also noted that Claimant "can do consistent sitting tasks with just short breaks every hour. She does well with fine motor tasks as long as she controls her head position." CX 87 at 200. Ms. Dowler found that Claimant is able to lift and carry five pounds frequently and ten pounds occasionally. Ms. Dowler found that Claimant could not do any of the three positions approved by Dr. Neumann from the labor market survey (the fast food worker position at Subway, the restaurant host position at Taj Mahal Restaurants, and the hostess position at Red Robin). These positions were all unsuitable because they involved lifting of at least 20 pounds and would require Claimant to be on her feet all day. CX 87 at 201. Ms. Dowler recommended retraining to enter another field and treatment through the Feldenkreis program to improve her posture and movement. CX 87 at 202.

At his deposition on April 12, 2005, Dr. Neumann testified that Claimant was not at maximum medical improvement because she had experienced rather rapid deterioration and would probably continue to experience loss of range of motion and continued pain problems. EX 18 at 19. He explained that he had originally thought she was at MMI in 2001, but that was prior to his "obtaining this visual information and objective evidence of rapid change." EX 18 at

19. Regarding treatment, Dr. Neumann opined that physical therapy or chiropractic treatment would not be helpful because Claimant already experienced rapid degenerative change and the additional stress from treatment could even cause more rapid deterioration. EX 18 at 23. He stated that massage treatment could make Claimant feel better, but would not be curative and could have an adverse impact, depending on the type of massage. EX 18 at 23-24. Regarding Claimant's vocational abilities, Dr. Neumann testified that a job that required occasional lifting of 25 pounds and repetitive lifting of no more than 10 pounds would be okay, but a job that required repeated lifting of 25 pounds would not be appropriate. EX 18 at 21, 26. Consequently, he stated that he would approve a full-time restaurant host position or a housekeeper position, as long at lifting 20-25 pounds was restricted to occasional. EX 18 at 22, 24. However, he later conceded that he would not want Claimant in a position where she had to stand all day and bend over trays, or where she had to lift and carry up to 30 pounds even occasionally, or where she had to frequently look up and down or from side to side. EX 18 at 25-27. He stated that she could do full-time sedentary work, which he described as mostly sitting and lifting up to ten pounds. EX 18 at 24.

At the hearing, Dr. Chandler testified that massage would be better than chiropractic manipulation for treating Claimant's condition. TR at 107. He explained that if Claimant sought chiropractic treatment, "she could actually injure herself worse, particularly if she has little fragments, pieces of the ligaments that are out there floating around that can get back in between the joints," which would be "devastating." TR at 108. Dr. Chandler also stated that Claimant is not a candidate for surgery at this time, but that he might later consider a performing a disc replacement or implanting a nerve stimulator to control her headaches. TR at 108, 110-11, 114. He stated that he would recommend massage therapy for her. TR at 108-109. He recommended teaching Claimant's husband or caregivers how to perform massage therapy or other home treatments to reduce doctor's visits and cut costs. TR at 109. He also testified that the amount spent on Claimant's medical treatment was "very reasonable" for her injury. TR at 107-08. Dr. Chandler expressed concern that "this is the beginning, not the end" in that Claimant "will have to deal with this the rest of her life; medication, supportive therapy will be a problem forever." TR at 108. He testified that he is hopeful that Claimant would continue to do well enough with her pain medications and treatments to participate in vocational retraining, but that he generally leaves such opinions to vocational specialists and physical therapists. TR at 115.

At the hearing, Ms. Dowler testified about the physical capacity evaluation that she conducted in March 2005. TR at 164. She explained that she conducted the test in seven or eight hours over two days because her "goal is to find out what people can do hour-after-hour, day-after-day and week-after-week, not what they can do in one given time in history." TR at 174. It is important to her "to take people to the highest level that they can achieve in one day, see how they've done that night, re-evaluate some more and [do] some of the same tests the following day." TR at 174. She testified regarding Claimant's decreased range of motion and strength, as well as the pain trigger points that are affected by the way she uses her head and neck and the activities she does. TR at 166-68. She stated that Claimant "tested very consistently at the sedentary level of physical characteristics, and that doesn't mean just sitting, but it means that she really only handles ten pounds occasionally and less than ten pounds frequently." TR at 172. Ms. Dowler emphasized that Claimant's "attempts to do 15 and 20 pounds always met with an immediate elevation in pain or muscle spasms or just inability to

handle the weight." TR at 173. She testified that Claimant "is a bright lady who certainly could get more training and do sedentary-type work," but that there is no sedentary work she can do now without training because she does not have any computer skills. TR at 180, 187-88. Ms. Dowler testified that Claimant requires a job "with flexibility to be able to walk and move around… [and] not be stuck behind a desk either hours a day or not be stuck on her feet eight hours a day." TR at 181. As discussed hereafter, she discussed in detail why each of the three positions identified in Employer's labor market survey would be inappropriate for Claimant. TR at 176-80. Finally, with regard to vocational training and rehabilitation, she testified that there are no OWCP-certified vocational rehabilitation counselors in Anchorage, and that the nearest certified counselor is five hours away in Homer, Alaska. TR at 181-82.

Also at the hearing, Claimant testified that she has not returned to work since November 2004. TR at 147. Claimant would like to return to work. TR at 149-50. She stated, "I believe that with some retraining and some more education, that you know, my years of experience and the training I've had, that there's something I could do with my love of children, as far as helping others to become more knowledgeable in the early childhood field." TR at 150. Claimant does not think it is possible for her to work hands-on with children any more, but feels it would be possible, with training and education, for her to train staff to work with children. TR at 160.

Claimant and her husband each testified that her ability to perform household chores, spend time with her grandchildren, and do her hobbies has been severely limited since her work injury. In particular, Mr. Sherman testified that Claimant previously kept "a very neat house" and "did the majority of the housework." TR at 50. However, Claimant still does some household chores, but is no longer able to do any vacuuming and her husband has to help her with things like carrying the laundry. TR at 51, 148. Mr. Sherman testified that Claimant enjoys spending time with her three young grandchildren but that she must be careful to limit her activities. TR at 52. She tried taking care of her grandchildren for three days once, but ended up having to stay in bed for three or four days and go to the hospital for pain afterward. TR at 148-49. Claimant testified that she travels to Alabama about once a year for about three to four weeks at a time to visit her family there. TR at 157-59. She testified that the flight is uncomfortable and aggravates her condition, but she is able to handle it by bringing a special pillow and trying to sleep. TR at 158. Mr. Sherman testified that they used to enjoy hobbies such as bicycling, hiking, and fishing, which she is no longer able to do. TR at 50. Claimant used to have a sizeable vegetable garden and a flower garden, and now only has a small flower bed that she occasionally works in when she is feeling well enough. TR at 50-51; 148.

At the time of trial, Claimant's pain level was the best it has been since 2000, with the treatment from Dr. Chandler and the pain medication prescribed by the Mayo Clinic. TR at 156.

CONCLUSIONS OF LAW

These findings of fact and conclusions of law are based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon the analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In arriving at a decision in this matter, I am entitled to determine the credibility of witnesses, to

weigh the evidence, and to draw my own inferences from it; furthermore, I am not bound to accept the opinion or theory of any particular medical expert. *See Banks v. Chicago Grain Trimmers Assoc., Inc.,* 390 U.S. 459, 467, *reh'g denied,* 391 U.S. 929 (1968); *Todd v. Shipyards Corp. v. Donovan,* 300 F.2d 741, 742 (5th Cir. 1962); *Scott v. Tug Mate, Inc.,* 22 BRBS 164, 165 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988).

Credibility

Claimant

I found Claimant to be generally credible regarding her pain levels and physical limitations. At trial Claimant moved gingerly and needed to adjust her position and stand-up from time to time. At one point, Claimant understandably broke down and cried when discussing her limited activities of daily living and her inability to work or maintain a vegetable garden as in the past. There was no credible conflicting evidence presented challenging this testimony or her credibility in relation to her testimony concerning her ability to quickly recover from her slip on ice while working at Wonder Park Elementary, from her car accident, or her ability to fly to Alabama with her restrictions.

Brad Sherman (Claimant's husband)

Mr. Sherman was a credible witness who discussed Claimant's limitations, prior wages, and the payment of Claimant's medical expenses related to the subject injury as well as medical expense claims listed in error. (See CX 76; CX 78; and TR at 36-49, 52-62.)[3]

Dr. Leon Chandler (Claimant's treating physician)

Dr. Chandler is Claimant's treating physician as of January 2002. According to his curriculum vitae, he specializes in anesthesiology and pain management. CX 68 at 119. I found Dr. Chandler to be a very credible witness, especially with regard to his diagnosis of Claimant's condition based on the diagnostic facet blocks that he performed. Dr. Chandler's opinions, as Claimant's treating physician, are entitled to special weight because a treating physician is employed to cure and has a greater opportunity to know and observe the patient as an individual. *Amos v. Director, OWCP, 153 F.3d 1051, 1054 (9th Cir. 1998), amended, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), cert. denied, 528 U.S. 809 (1999).* I give Dr. Chandler's opinions special weight as Claimant's treating physician and because his diagnosis of a torn facet joint in Claimant's neck or cervical spine between C4-C5 is logical and supported by objective evidence including the x-ray showing the dye passing through Claimant's ligament and spilling out into the epidural space and down her spinal cord, whereas with a normal joint, the dye would have remained in the capsulated joint space. See TR at 92, 116, 125. I also find Dr.

[3] At trial Claimant's counsel agreed to resolve the issue of medical expense reimbursement or payment listed in error with Employer counsel. TR at 60. My award under section 7 of the Act hereafter is limited to medical expenses related to Claimant's treatment for her neck pain, headaches, muscle spasms, and right shoulder pain related to the subject work-related injury on October 20, 2000.

Chandler credible for his opinion that Claimant's October 20, 2000 injury aggravated her earlier or pre-existing C7 problem and accelerated Claimant's cervical spine degeneration and arthritis. See TR at 98 and 109.

Elizabeth Dowler (Claimant's vocational expert)

Elizabeth Dowler has a Ph.D. in Ergonomics. She is also a registered occupational therapist since 1972, a certified rehabilitation counselor since 1983, and a certified professional ergonomist since 2001. CX 69 at 124. She is in business as an office and industrial ergonomics specialist and as vocational evaluation specialist. CX 69 at 124. However, she also serves as a witness for worker's compensation and personal injury legal matters. TR at 185. She asserts that her practice is generally half for plaintiffs and half for defendants, although that ratio was closer to seventy percent for plaintiffs and thirty percent for defendants a few months before the trial. TR at 185.

I found Ms. Dowler to be a credible witness who testified with believable confidence as an expert in physical and vocational evaluations. Moreover, I find Ms. Dowler's assessments of Claimant's abilities and work restrictions to be more credible than those of Dr. Neumann because Ms. Dowler's opinions are based on a physical capacity evaluation conducted over two days, which is more representative of Claimant's abilities and pain levels in a regular, daily job. *See* TR at 174. In addition, it is noteworthy that Dr. Chandler, who I also found credible, relies of Ms. Dowler's expertise and skills in assessing his patients through physical capacity evaluations. TR at 101-02.

Dr. Holm Neumann (Employer/Carrier's medical examiner)

Dr. Neumann is an orthopedist. (CV = EX 10). Dr. Neumann did not testify at the hearing, but the transcript of his videotaped deposition was submitted as Employer's exhibit 18. Dr. Neumann is not credible with regard to Claimant's extent of disability because his opinions kept changing. In February 2002, he found that she was able to do three of the positions from the labor market survey. EX 8. However, at his deposition in April 2005, he opined that Claimant might be able to do a hostess position, one of the positions he had approved in February 2002, or a housekeeper position, a position he had previously rejected as unsuitable. EX 18. And, according to Employer post-hearing brief, Dr. Neumann decided in February 2005 that Claimant could no longer do any of the positions he had previously approved. ALJX 13 at 8.

Dr. Neumann's opinions changed on other issues as well. For example, between his first IME (EX 8) and his second IME (CX 67; EX 9), Dr. Neumann wavered in his opinion with regard to whether the degenerative changes in Claimant's cervical spine were due to a pre-existing condition or due to her work injury. In addition, his opinions changed with regard to whether Claimant was at maximum medical improvement. In his first IME, Dr. Neumann found that Claimant was at maximum medical improvement. (EX 8) Then, in his second IME, Dr. Neumann found that Claimant had reached maximum medical improvement, but he could not tell when. (EX 9). Then, at his deposition, Dr. Neumann opined that Claimant was <u>not</u> at maximum medical improvement. (EX 18)

As a result, I reject Dr. Neumann's opinions that conflict with treating physician Dr. Chandler as being unreliable and non-credible. I do adopt his opinions, however, that Claimant's work injury was "a significant factor contributing to her current condition." CX 67 at 116; EX 9 at 66. I also adopt his opinion that even if Claimant "did have some pre-existing degenerative change, it would be a combined condition with a worsening and permanent aggravation" due to her work injury. CX 67 at 117; EX 9 at 67. Finally, I agree with Dr. Neumann that future treatment should only be palliative, and nonsteroidal anti-inflammatory medications and palliative massage therapy. See EX 9 at 68.

Analysis

As referenced above, substantial evidence supports my approving the stipulations that Claimant suffered an unscheduled disability to her cervical spine as a result of her October 20, 2000 work-related injury. The following analysis relates to the only remaining issues needing resolution as per the parties.

1. Extent of Claimant's temporary and permanent disability.

The parties in this case have stipulated that Claimant is unable to return to her usual work as a Child and Youth Program Technician, and I find that stipulation to be supported by substantial evidence. Stip. Fact No. 10; CX 71, CX 8, CX 87, CX 73 at 138; and EX 8.

If a claimant has established that with her physical restrictions she cannot return to her regular work, he or she will be considered permanently totally disabled unless the employer establishes suitable alternative employment. *See EX 5 at 66; Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). The employer must show the existence of realistically available job opportunities within the geographical area where the claimant resides which he is capable of performing, considering his age, education, work experience, and physical restrictions. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1978). If the employer meets its burden and establishes suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. *See Edwards v. Director, OWCP*, 999 F.2d 1374 (9th Cir. 1993); *Williams v. Halter Marine Service*, 19 BRBS 248 (1987).

The judge may rely on the testimony of vocational counselors regarding specific job openings to establish the existence of suitable positions. *See Turney v. Bethlehem Steel Corp*., 17 BRBS 232 (1985). The counselors must identify specific available positions; labor market surveys are not enough. *See Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380 (1983). The judge may credit a vocational expert's opinion even if the expert did not examine the claimant, as long as the expert was aware of the claimant's age, education, industrial history, and physical limitations when exploring the local job opportunities. *See Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

In an effort to show that Claimant can obtain and perform suitable alternative employment with other employers in the Anchorage, Alaska area, Employer submitted a report

by vocational consultant Carl Gann. EX 7. This report purports to show that as of February 2, 2002, there were seven open positions that, in Mr. Gann's opinion, met Claimant's work restrictions, matched the functional capacity evaluation conducted in August 2001 (CX 32), and also took into consideration Claimant's age, education, and work experience. EX 7. The positions were 1) a fast food worker/sandwich artist at Subway; 2) a fast food worker at Orange Julius; 3) a host at Taj Mahal Restaurants; 4) a hostess at Red Robin restaurant; 5) a server at Red Robin restaurant; 6) a housekeeper at Parkwood Inn; and 7) a barista at Heavenly Cup coffee shop. EX 7 at 41-47.

Of the seven positions identified by Mr. Gann, Dr. Neumann approved of only three. CX 72. On February 22, 2002, Dr. Neumann approved of the following three positions from the Labor Market Survey: 1) the fast food worker/sandwich artist position at Subway, 2) the restaurant host position at the Taj Mahal Restaurant, and 3) the hostess position at Red Robin restaurant. CX 72. In his deposition in April 2005, Dr. Neumann stated that these positions, as well as the housekeeper position that he had previously rejected, might still be appropriate for Claimant if the jobs could be restricted to lifting 20-25 pounds only occasionally. EX 18 at 21-22. However, Employer's closing brief states, "The employer and carrier agree that when Dr. Neumann reevaluated Ms. Sherman in February 2005, he found that those jobs [that he approved in February 2002] were no longer appropriate for her." ALJX 13 at 8. As discussed above, I do not find Dr. Neumann credible with regard to Claimant's ability to do the positions from the labor market survey, because his opinions kept changing.

In contrast, I find Ms. Dowler's March 2005 report and her trial testimony to be much more credible. In her March 2005 physical capacity evaluation, she found that Claimant is able to work in a seated position for up to one hour at a time and in a standing position for about 30 minutes at a time. CX 87 at 200. Ms. Dowler found that Claimant is able to lift and carry five pounds frequently and ten pounds occasionally. She found that Claimant could not do any of the three positions approved by Dr. Neumann from Mr. Gann's February 2002 labor market survey (the fast food worker position at Subway, the restaurant host position at Taj Mahal Restaurants, and the hostess position at Red Robin). These positions were all unsuitable because they involved lifting of at least 20 pounds and would require Claimant to be on her feet all day. CX 87 at 201.

In her trial testimony, Ms. Dowler elaborated on the inappropriateness of these three positions. First, with regard to the fast food worker position at Subway, she stated the position would most likely require Claimant to stand all day, and that even if she were able to use a stool, it would require her constantly "to look up to talk to the customer and down to do the sandwich." TR at 177. The Subway position would require constant reaching, which "would be very difficult for her to do every day." TR at 177. Second, Ms. Dowler explained that the Taj Mahal hostess position would be unsuitable because "you're on your feet the whole time [with] no sitting at all." TR at 178. This would be problematic for Claimant because she can only stand for 30 minutes at time without aggravating her neck. TR at 178. Claimant would also be "expected to lift and carry up to 20 pounds, and …she can't comfortably do beyond ten." TR at 178. Third, the hostess position at Red Robin would be unsuitable because it would require regular clearing of tables and lifting heavy trays when the servers needed help. TR at 179. In addition, Ms. Dowler explained that Red Robin is a busy restaurant with a primarily young staff,

which in her opinion, "would be as bad [for Claimant] as taking care of the hundred kids [in fall 2004]." TR at 179. Moreover, Ms. Dowler opined that Claimant would not have a realistic chance of being hired for either of the hostess positions because those types of places typically do not hire 45-year-old women as hostesses. TR at 180.

I credit Ms. Dowler's assessment of Claimant's work restrictions and abilities. She found that Claimant is able to work in a seated position for up to one hour at a time and in a standing position for about 30 minutes at a time. She also noted that Claimant "can do consistent sitting tasks with just short breaks every hour. She does well with fine motor tasks as long as she controls her head position." CX 87 at 200. Ms. Dowler found that Claimant is able to lift and carry five pounds frequently and ten pounds occasionally. This assessment is consistent with Claimant's own testimony regarding her experiences working in various positions since her injury and in attempting activities of daily living. In contrast, the assessments of Dr. Neumann and Ms. McGovern, whose physical capacity evaluation was relied upon by Mr. Gann in conducting his labor market survey, are not to be credited because they were conducted over only one day. Although they both found that Claimant was able to handle 20-30 pounds of weight, Claimant reported high pain levels the next several days. Such tests do not accurately determine Claimant's ability to perform tasks regularly, because the test was done over only one day and "musculoskeletal pain consistently occurs the next day." CX 87 at 200. Thus, I concur with Ms. Dowler's assessments, and I find that Claimant is able to lift and carry five pounds frequently and ten pounds occasionally. I also find that she is able to sit for one hour and stand for thirty minutes before needing a break or change in position. Furthermore, I find that Claimant should avoid frequent turning or up-and-down movements of her head. EX 9 at 67.

Based on these work restrictions, I find that all of the positions identified are unsuitable for Claimant because they involve extended standing without opportunities to sit or take breaks as frequently as Claimant requires. These positions would also require lifting loads in excess of ten pounds, which is the most the Claimant is able to lift without exacerbating her symptoms. In addition, I find that the Subway position is particularly unsuitable because the frequent up-and-down movements of her head that this position would require. See EX 9 at 67.

Thus, Claimant is considered to be totally disabled. However, Claimant is considered to be partially disabled during those periods when she was working part-time as a noon duty playground supervisor or as a supervisor with the after school program. Claimant's periods of disability are as follows:

October 21, 2000 – November 15, 2000 =	temporary total
November 16, 2000 – December 25, 000 =	no disability (back at usual work)
December 26, 2000 – April 8, 2001 =	temporary total
April 9, 2001 – April 15, 2001 =	temporary partial (earning $188.23/week in light duty for Employer)

April 16, 2001 – September 2, 2002 =	temporary total
September 3, 2002 – June 7, 2003 =	temporary partial (earning $90/week as noon duty playground supervisor for Anchorage School District)
June 8, 2003 – September 3, 2003 =	temporary total
September 4, 2003 – June 1, 2004 =	temporary partial (earning $90/week as noon duty playground supervisor for Anchorage School District)
June 2, 2004 – September 2, 2004 =	permanent total
September 3, 2004 – September 10, 2004 =	permanent partial (earning $90/week as noon duty playground supervisor for Anchorage School District)
September 11, 2004 – November 12, 2004 =	permanent partial (earning $120/week as an after-school supervisor for Anchorage School District)
November 13, 2004 – present and continuing =	permanent total

2. *Reimbursement of expenses for chiropractic treatments and massage therapy incurred by Claimant and her health insurance carrier*.

Section 7(a) of the Act provides in relevant part that the "Employer shall furnish medical, surgical, and other attendance or treatment…for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In order for medical expenses to be assessed against an employer, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Reasonable and necessary medical expenses are those related to and appropriate for the diagnosis and treatment of the industrial injury. 20 C.F.R. § 702.402; *Pardee v. Army & Air Force Exchange Serv*., 13 BRBS 1130, 1138 (1981).). Claimant carries the burden to establish the necessity of such treatment rendered for his work-related injury. *See generally Schoen v. U.S. Chamber of Commerce,* 30 BRBS 112 (1996); *Wheeler v. Interocean Stevedoring Inc*., 21 BRBS 33 (1988). A claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984

Here, Employer argued that the payments made to various chiropractic offices are not reimbursable under the Act because, under 20 C.F.R. § 702.404, payments to chiropractors are reimbursable "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings." ALJX 13 at 10-12. Employer argued that x-rays and MRIs of Claimant's spine from October 21, 2000; February 8, 2001; February 6, 2002; and March 1, 2002 showed no evidence of subluxation. ALJX 11.

On the other hand, Claimant argued that Chiropractor Barrington and Chiropractor Krichbaum each specifically stated that their treatments were manual manipulations to correct subluxations that were shown by their x-rays and clinical findings. ALJX 12 at 12. In addition, Claimant explained that she did not receive chiropractic care from either Chiropractor Ross or Chiropractor Kmet, but rather, she received massage therapy from a licensed massage therapist who was billed through their offices for insurance purposes. ALJX 12 at 12-13.

The applicable regulations state that medical care provided by chiropractors is reimbursable "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings." 20 C.F.R. § 702.404. The Benefits Review Board interpreted the regulation regarding chiropractic treatment in *Bang v. Ingalls Shipbuilding, Inc.*, 32 BRBS 183 (Aug. 4, 1998). The Board explained, "The regulation provides that a chiropractor's services are reimbursable only for spinal manipulations to correct a subluxation. The regulation does not specifically provide for any other treatment provided by a chiropractor, even if such treatment is reasonable and necessary." 32 BRBS at 185 (Emphasis in original). The Board noted that "this interpretation results in an incongruity" in that certain therapies or treatments provided would be reimbursable if provided by a physical therapist or other non-physician medical professional, but would not be reimbursable if provided by a chiropractor. *Id.*

"Subluxation" is generally a diagnosis made by chiropractors based on their own x-rays and clinical findings. Chiropractors specialize in the diagnosis and treatment of subluxations. Thus, the failure of Claimant's medical doctors to make a diagnosis of subluxation from their x-rays and MRIs does not mean that she did not have any subluxations. I find no reason to discredit the diagnosis of subluxations made by Claimant's chiropractors in this case.

Claimant was treated by Chiropractor Barrington on at least six occasions from January 2, 2002 through February 2, 2002. CX 76 at 155. On October 3, 2002, Chiropractor Barrington explained that he had treated Claimant for subluxations with manual manipulation and appropriate therapy modalities. CX 49 at 79. On June 24, 2005, Chiropractor Barrington sent a letter to Claimant's counsel, explaining that his "diagnosis of this patient included subluxations of her neck and back with recommendation for manual therapy and appropriate physical therapy modalities." CX 90 at 208. He explained that the diagnosis was based on "clinical evidence, as well as evidence on x-rays of her cervical spine, indicating spondylosis and resultant subluxation." CX 90 at 208. Thus, since he was treating Claimant with manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings, the payments made to him for such services are reimbursable under the Act.

Similarly, Claimant was treated by Chiropractor Krichbaum ten to fifteen times between June 14, 2002 and January 6, 2003. CX 47; CX 89; TR at 137. On March 15, 2005, Chiropractor Krichbaum issued a letter stating that the treatments he provided to Claimant from June 28, 2002 to October 9, 2002 and on January 6, 2003 were "for manual manipulation of the spine to correct subluxations shown by [his] x-rays and clinical findings." CX 89 at 207. Thus, as with Chiropractor Barrington, since Chiropractor Krichbaum was treating Claimant manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings, the payments made to him for such services are reimbursable under the Act.

With regard to the massage therapy Claimant received, the applicable regulations define reimbursable medical care broadly as any treatment or service, including that provided by a non-physician, "which is recognized as appropriate by the medical profession for the care and treatment of the injury or disease." 20 C.F.R. § 702.401(a). Thus, regarding section 702.401 in conjunction with section 702.404, massage therapy that was appropriate for treating a claimant's condition would be reimbursable, as long as it was not provided by a chiropractor. *See Bang*, 32 BRBS at 185.

Here, Claimant was treated with massage therapy by a licensed massage therapist at the offices of Chiropractor Ross and Chiropractor Kmet. TR at 137; ALJX 12. She was not treated by either chiropractor, and did not receive chiropractic treatments. TR at 137; ALJX 12. Claimant was required to obtain her massage therapy through a chiropractic office for insurance purposes. TR at 137. Claimant was initially referred to Reclaim Health for physical therapy and massage therapy by Dr. Hagen. CX 11 at 14; CX 26 at 35. Then, she proceeded with physical therapy and massage therapy at United Physical Therapy, in conjunction with her treatment by Dr. Chandler. CX 36 at 55. Dr. Chandler found that massage therapy was an appropriate and beneficial treatment for Claimant's cervical spine condition.[4] TR at 107. Also, Dr. Neumann's recommendations for Claimant's future treatment included palliative massage therapy. Dr. Neumann conceded that massage therapy would be appropriate for Claimant, as long as it was not a heavy, deep massage that could hurt her. TR at 24. Thus, because the massage therapy Claimant received was recommended by various physicians as appropriate for treating her persistent pain condition and it was not performed by a chiropractor, the payments made to Chiropractors Ross and Kmet are reimbursable under the Act.

ORDER

Based on the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that:

1. Employer shall pay Claimant temporary total disability compensation at a rate of $323.33 ($485 x 2/3) per week from October 21, 2000 to November 15, 2000; from December 26, 2000 to April 8, 2001; from April 16, 2001 to September 2, 2002; June 8, 2003 – September 3, 2003.

[4] Dr. Chandler testified that it might benefit Employer in the long run to pay to train Mr. Sherman to perform massage therapy for Claimant. I concur that if Mr. Sherman and Claimant agree, this training is a creative solution for Claimant's ongoing massage therapy needs.

2. Employer shall pay Claimant temporary partial disability compensation at a rate of $244.51 per week from April 9, 2001 to April 15, 2001.

3. Employer shall pay Claimant temporary partial disability compensation at a rate of $263.33 per week from September 3, 2002 to June 7, 2003; from September 4, 2003 to June 1, 2004; and from September 3, 2004 to September 10, 2004.

4. Employer shall pay Claimant permanent partial disability compensation at a rate of $243.33 from September 11, 2004 to November 12, 2004.

5. Employer shall pay Claimant permanent total disability compensation at a rate of $323.33 per week from June 2, 2004 to September 2, 2004; and from November 13, 2004 to the present and continuing.

6. Employer shall pay Claimant, Calypso, or the medical provider, if unpaid, her reasonable medical expenses incurred with respect to her cervical spine condition from October 20, 2000 to the present and continuing, including the chiropractic and massage therapy expenses, as the nature of Claimant's work-related disability required(s) and as described in the decision above.

7. Employer is entitled to a credit for all disability payments and medical expenses previously made to Claimant in relation to the October 20, 2000 injury.

8. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the OWCP shall be paid on all accrued benefits computed from the date each payment was originally due to be paid.

9. The District Director shall make all calculations necessary to carry out this Order.

10. Counsel for Claimant shall within 20 days after service of this Order submit a fully supported application for costs and fees to counsel for Employer and to the undersigned Administrative Law Judge if Claimant has gained any monetary benefit from this Decision and Order such that Claimant be deemed the prevailing party, if any. Within 20 days thereafter, counsel for Employer shall provide Claimant's counsel and the undersigned Administrative Law Judge with a written list specifically describing each and every objection to the proposed fees and costs. Within 20 days after receipt of such objections, Claimant's counsel shall verbally discuss each of the objections with counsel for Employer. If the two counsel disagree on any of the proposed fees or costs, Claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are still in dispute and set forth a statement of Claimant's position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for Employer. Counsel for Employer shall have 15 days from the date of service of such application in which to respond. No reply will be permitted unless

specifically authorized in advance.

IT IS SO ORDERED.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California